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No. 86-1284

In The
Supreme Court Of The United States

OCTOBER TERM, 1986

RAYMOND M. LOPES, Commissioner of the Connecticut Department of Correction, in his individual capacity,
Petitioner,

v.

ERNEST P. MELE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE:

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QUESTION PRESENTED

DID THE COURT OF APPEALS ERR IN HOLDING THAT THE PETITIONER CANNOT CLAIM QUALIFIED IMMUNITY ON THE GROUNDS THAT HE DID NOT KNOW OR HAVE REASON TO KNOW IN 1984 THAT THE CONSTITUTION REQUIRED SOME PROCESS BEFORE A PERMANENT GOVERNMENT EMPLOYEE COULD BE DISMISSED?

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STATEMENT OF THE CASE

This case is a civil rights action brought in the United States District Court for the District of Connecticut by the Respondent, Ernest P. Mele, pursuant to 42 U.S.C. Section 1983 and the Declaratory Judgment Act, 28 U.S.C. Sections 2201, 2202. Jurisdiction of the District Court was based upon 28 U.S.C. Sections 1331, 1343.

The Respondent, Ernest P. Mele, was a permanent classified state service employee, employed as a lieutenant in the Connecticut Department of Corrections. J.A. 6,34. 1/

1/ The abbreviation "J.A." refers to the Joint Appendix filed with the United States Court of Appeals for the Second Circuit.

He was advised by letter dated May 1, 1984 that he was being placed on leave of absence without pay for thirty days, effective April 30, 1984, pending administrative investigation. J.A. 26. He was given no notice of the charges against him and no opportunity to respond to those charges prior to being placed on leave of absence without pay. J.A. 6, 7, 34. By letter dated May 24, 1984, he was notified that his leave of absence without pay had been extended for an indefinite period. J.A. 27.

By letter from Warden Victor Liburdi, dated August 23, 1984, Mele was informed that he was being dismissed , effective April 30, 1984, for conviction of a crime. J.A. 28. Mele was given no notice of the charges against him or an opportunity to

respond to those charges prior to his termination. J.A. 7, 35.

Respondent subsequently initiated suit in the United States District Court for the District of Connecticut alleging procedural and substantive due process violations. J.A. 8, 9. Respondent also challenged the constitutionality of Connecticut General Statutes Section 5-240, on its face and as applied to him. J.A. 10. Following an amendment to the Respondent's complaint, the named defendants in this action were Raymond M. Lopes, Commissioner of Corrections, in his official and individual capacities, William A. O'Neill, in his capacity as Governor of the State of Connecticut, Joseph I. Lieberman, in his capacity as

Attorney General of the State of Connecticut, and Victor Liburdi, Warden of the Connecticut Correctional Center - Cheshire, in his official and individual capacities. J.A. 3-5.

On February 4, 1986, the defendants moved the District Court, pursuant to Fed.R. Civ.Pro. 12(b)(2) and 12(b)(6) to dismiss several claims against them. J.A. 13-15. The defendants' motion was granted in part and denied in part. J.A. 41. The only aspect of the defendants' motion to dismiss which is relevant to this Petition was the denial with respect to Petitioner Lopes in his individual capacity. Petitioner Lopes had claimed that he was entitled to qualified immunity since the law regarding due process to be afforded permanent state

employees with property rights in their employment was not clearly established before this Court's decision in Cleveland Board of Education v. Loudermill, ___ U.S. ___, 105 S.Ct. 1487 (1985). Lopes's claim was rejected by the district court. J.A. 39-41.

Petitioner Lopes appealed the District Court's decision, on the qualified immunity issue, to the United States Court of Appeals for the Second Circuit. The Second Circuit affirmed the District Court's decision in an unreported opinion dated November 6, 1986. The Second Circuit concluded that case law prior to Loudermill made it clear that some form of process is due before the owner of a property interest in employment is finally deprived of it.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS IS CORRECT.

In Harlow v. Fitzgerald, 457 U.S. 800 (1982) the Supreme Court held that government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known. Id at 818. It is the Petitioner's position that the right of a public employee to notice and an opportunity to be heard prior to a decision of termination or suspension was not clearly established until the March 19,

1985 decision in Cleveland Board of Education v. Loudermill, ___U.S.___, 105 S.Ct. 1487 (1985).

Contrary to Petitioner's position, the due process requirements were clearly established prior to Loudermill. As long ago as 1914, the Supreme Court emphasized that "the fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914). In several decisions commencing in the 1950s the Supreme Court concluded that public employees have interests in maintaining their jobs that cannot be abridged without due process. See, for instance, Slochower v. Board of Education, 350 U.S. 551 (1956); Wieman v. Updegraff, 344 U.S 183 (1952); Board of Regents v. Roth,

408 U.S. 564 (1972).

In January of 1972, twelve years prior to the Respondent's suspension and dismissal, the Supreme Court reaffirmed that "before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, except [in] extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." Boddie v. Connecticut, 401 U.S 371, 379 (1972).

In Loudermill, supra, the Supreme Court reiterated that certain substantive rights - life, liberty, property - cannot be taken away except pursuant to constitutionally adequate procedures and that a property interest could not be "defined by the procedures provided

for its deprivation." Id. at 1493. It is the Petitioner's position that the holding in Loudermill represented a departure from this Court's prior holdings.

Petitioner's argument appears to have its genesis in the plurality opinion in Arnett v. Kennedy, 416 U.S. 134 (1974), which Petitioner cites for the "bitter with the sweet " approach to public employee discipline. This approach, however, gathered the support of only three justices in Arnett and was specifically rejected by the other six. See, for instance, 416 U.S. at 166-167 (Powell, J. joined by Blackmun, J.); Id at 177-178 (White, J.); Id at 211 (Marshall, J. joined by Douglas and Brennan, JJ.). Thus, the position in Arnett which Petitioner argues was the

law prior to Loudermill was only a minority view held by the Chief Justice and Justices Rehnquist and Stewart. While a plurality of the Court reached the conclusion that there had been no due process violation in Kennedy's case, the 'bitter with the sweet' approach was not adopted by the plurality in Arnett.

Contrary to Petitioner's assertion, Arnett did not decide that no hearing was due an employee prior to termination. Rather, Arnett decided that no full evidentiary hearing was required before termination, with Justices Stewart, Burger and Rehnquist reaching that conclusion on the basis that since the state statute created the property right it could also create the procedural safeguards for it and

Justices Powell and Blackmun reaching the same conclusion through reasoning that since there was advance notice of the charges against the employee and given a balancing of the competing interests of the permanent employee and the government no full evidentiary hearing was required. 2/

Since Arnett the 'bitter with the

2/ The precise issue before the Arnett court was not whether any hearing is required by the Fourteenth Amendment prior to termination of a permanent state employee, but, whether, a full evidentiary hearing is required prior to such termination. The Arnett court's response was, of course, "no".

Further, it must be noted that in Arnett the statutory scheme and attendant regulations which created the property right in employment also created extensive procedural safeguards of that right which were afforded to employees prior to adversary action and it is precisely that scheme and its attendant regulations which were found to be constitutional by the plurality.

sweet' theory, seemed to gather some additional support. For instance, see Bishop v. Wood, 426 U.S 341, 355-361 (1976) (White, J. dissenting). Goss v. Lopez, 419 U.S.-- at 586-587 (Powell, J. joined by Burger, CJ and Blackmun and Rehnquist, JJ. dissenting). 3/

3/ Unlike Arnett, Bishop v. Wood did not deal with the issue of what procedural due process was due but addressed the issue whether a Marion, North Carolina city ordinance providing that a permanent employee may be discharged if he fails to perform work up to the standard of his classification, or if he is negligent, inefficient, or unfit to perform his duties should be read to prohibit discharge for any other reason, thus conferring tenure on all permanent employees and creating property interests in employment. A majority of the Court held that no such property interest was created by the ordinance, since the ordinance could also be construed as granting no right to continued employment but merely conditioning an employee's removal on compliance with certain specified procedures. Thus, the majority in Bishop interpreted the ordinance to grant procedural but no substantive rights.

Subsequently, however, the Supreme Court has clearly rejected this position. In Vitek v. Jones, 445 U.S. 480, 491 (1980) , for instance, it pointed out that " minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." This conclusion was reiterated by the Supreme Court in Logan v. Zimmerman Brush Co. , 455 U.S. 422 (1982) where the Supreme Court reversed a lower court's holding that because the entitlement arose from a state statute, the legislature had the prerogative to define the procedures to be followed to protect that entitlement. The Supreme

Court stated that

> [e]ach of our due process cases has recognized, either explicitly or implicitly, that because minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the state may have specified its own procedures that it may deem adequate for determin-ing the preconditions of adverse official action... Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest. The Court has considered and rejected such an approach... As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus, it has become a truism that 'some form of hearing' is required before the owner is finally deprived of a protected property interest. 455 U.S. at 431-32 (citing Board of Regents v. Roth, 408 U.S. at 570-71, n. 8).

It was in light of these holdings, subsequent to Arnett, that the Supreme Court in Loudermill stated that "it is settled that the 'bitter with the sweet' approach misconceives the constitutional guarantee... The point

is straightforward: the Due Process Clause provides that certain substantive rights - life, liberty, property - cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. " 105 S.Ct. at 1493.

Thus, this Court in Loudermill itself makes clear that its decision, far from being a departure from earlier precedent, is merely in keeping with its articulation of due process guarantees and requirements commencing with Vitek in 1980 and continuing with Logan in 1982, both well prior to the time that the Respondent was suspended and terminated without a hearing.

The Court of Appeals was thus correct in concluding that Petitioner's

actions as alleged in Respondent's complaint, violated clearly established constitutional rights of which a reasonable person would have known, cf. Harlow v. Fitzgerald, supra, at 815, in affirming the decision of the district court. 4/

4/ Davis v. Scherer, 468 U.S. 183, 192 n. 10 (1984), upon which Petitioner relies, itself makes clear that in the decisions of this Court by 1978 had required 'some kind of a hearing' .... prior to discharge of an employee who had a constitutionally protected property interest in his employment. But the Court had not determined what kind of a hearing must be provided. (Citations omitted, emphasis added.)

II. THERE IS NO CONFLICT BETWEEN THE HOLDING BELOW AND DECISIONS FROM OTHER CIRCUITS.

Contrary to the Petitioner's assertion, Brasslett v. Cota, 761 F.2d 827 (1st Cir.1985) is not contrary to the Second Circuit's decision in the instant case. In Brasslett the plaintiff, a former town fire chief, alleged, inter alia, procedural due process violations because the town had discharged him without providing him with a pretermination evidentiary hearing Id. at 835. The plaintiff did, however, have a pretermination conference with the town manager, during which he was notified of the possibility of discharge and was afforded ample opportunity to defend

his actions and to rebut any erroneous allegations. Id. at 836.

The First Circuit considered the question whether the plaintiff in Brasslett was entitled to a pretermination evidentiary hearing and, if not, whether he received the minimum process due him under the Fourteenth Amendment. In so doing, the First Circuit did refer to this Court's decision in Loudermill, recognizing that there this Court "delineated the scope of pretermination procedures that are due public employees" Id. at 836. The First Circuit relied on Loudermill not for authority on whether pretermination hearings were mandated by the due process clause of the Fourteenth Amendment, but for authority on the type of pretermination procedures so

mandated. The First Circuit thus concluded that the plaintiff was not entitled to a pretermination evidentiary hearing and that procedural due process requirements were met when the plaintiff was afforded his pretermination conference with the town manager. 5/

The Fifth Circuit's decision in

5/ It should be noted that the First Circuit in Brasslett recognized that this Court in Loudermill "clearly reiterated its rejection of the oft-cited plurality opinion in Arnett v. Kennedy, 416 U.S. 134 (1974), which advanced the proposition that a public employee's property interest in his employment is circumscribed by the deprivation procedures prescribed by the government." Id. at 836, n.7. The First Circuit also recognized that Loudermill was dispositive of the plaintiff's procedural due process arguments.

Levitt v. University of Texas at El Paso, 759 F.2d 1224 (5th Cir. 1985)was also in keeping with Loudermill. In Levitt the court noted that due process protections to which a tenured professor is entitled before he may be dismissed were enunciated in Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970).

> These minimum standards described the boundaries within which the state has discretion to adopt the procedures it finds most appropriate. These include the right of a professor to: (1) be advised of the cause for his termination in sufficient details so as to enable him to show any error that may exist; (2) be advised of the names and the nature of the testimony of the witnesses against him; (3) a meaningful opportunity to be heard in his own defense within a reasonable time; (4) a hearing before a tribunal that possesses some academic expertise and an apparent impartiality toward the charges. Id. at 1228.

The Levitt court then addressed the plaintiff's claims in light of the foregoing requirements.

Brown v. Trench, 787 F.2d 167 (3rd Cir. 1986), also cited by the Petitioner, stood for the proposition that an employee with property rights in her employment was denied due process when she was not granted a pretermination hearing. Id. at 172. In Buschi v. Kirven, 775 F. 2d 1240, (4th Cir. 1985) the court's holding on the due process issue was that the plaintiff therein received the hearing required by Loudermill and was thus not entitled to relief. Id. at 1255-56. Finally, Cohen v. City of Philadelphia, 736 F. 2d 81 (3rd Cir. 1984), cert. denied, ——— U.S. ———, 105 S. Ct. 434 (1984) was factually similar and

analogous to Parratt v.Taylor, 451 U.S. 527 (1981), where any constitutional violation resulted not from some established state procedure but from a random and unauthorized act by a state employee and thus the pre-deprivation process afforded the plaintiff was constitutionally adequate. Cohen, 736 F. 2d. 84, 86.

Thus, the very cases which Petitioner cites as evidencing conflict among the Circuits demonstrate that there is no such conflict. 6/

6/Although conflicts between decisions of Federal Circuit Courts of Appeals may provide grounds for a grant of certiorari under 28 U.S.C., Section 1254-1, certiorari will be granted in cases in which a settlement of the question by the Supreme Court is required. See Universal Camera Corporation v. NLRB, 340 U.S. 474 (1951). The issue which petitioner herein is raising, however, has already been reviewed and settled by the Supreme Court. See discussion, supra.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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